LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

JOSEPH W. HART, STELLA F. HART and J. CARL HARTELL,
Appellants,

v.

FEDERAL RESERVE BANK OF ATLANTA,
Appellee.

On Appeal from a Bill of Complaint in the United States District Court for the Northern District of Georgia.

BRIEF FOR APPELLANTS.

INDEX.

	Page
The Purpose of Executive Order No. 9112	2
The Malconstruction of Executive Order Compounded	20
Why Justice Department Cannot Invoke Doctrine of Estoppel to Protect Federal Reserve Bank	25
Why Defense of Federal Reserve Bank by Justice Department Is Contrary to Public Policy	26
Interrogatories Propounded by the Plaintiffs to Nicholas deB Katzenbach, Attorney General of the United States—Filed April 8, 1965	28
Supplementary Statement of Reasons Why Writ Should Be Granted	30
Appendix A—Excerpt From Testimony of Hon. Robert P. Patterson, Under Secretary of War, Before Committee on Banking and Currency, United States Senate, 77th Cong. 2d Sess, on S. 2250, a Bill to Mobilize the Productive Facilities of Small Business in the Interests of Successful Prosecution of the War, and for Other Purposes, Part 2, March 20, 1942, page 329	33
Appendix B—Announcement Concerning War Financing by Board of Governors of the Federal Reserve System Published in Federal Reserve Bulletin, April, 1942, page 424	39
Appendix C—Liaison Officer's Certificate to Federal Reserve Bank of Atlanta	42
Appendix D—Letter to Solicitor General	43
Appendix E—Reply of Solicitor General to Appendix D	47

CITATIONS.

Cases.

Johansen v. U. S., 342 U. S. 427, 72 S. Ct. 849, 96 L. ed. 1051 2

Lee v. Munroe & Thornton, 11 U. S. 366, 3 L. ed. 373.. 24

Scott Paper Co. v. Marcolus Mfg. Co., 326 U. S. 249, 66 S. Ct. 101, 90 L. ed. 47 26

Steele, use of Corn Exchange National Bank v. U. S., 113 U. S. 128, 5 S. Ct. 396, 28 L. ed. 952 30

U. S. v. Hart et al., 312 F. 2d 127, 130 27

U. S. v. Nice, 241 U. S. 591, 36 S. Ct. 696, 60 L. ed. 1192 2

U. S. v. Prescott, 3 How. 578, 11 L. Ed. 734 24

Wisconsin Central R. Co. v. United States, 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399 24

Statutes.

First War Powers Act, 1941, Title I 9

First War Powers Act, 1941, Title II, Sec. 201 7

Military Appropriations Act, approved June 20, 1941, 55 Stat. 366 8

Mobilization of Small Business Act (56 Stat. 351)..... 19

National Housing Act Amendment of 1942 (56 Stat. 301) 19

Title 31, U. S. C. A. 626 8

United States Constitution:

Art. I, Sec. 9, Cl. 7 7

Miscellaneous.

Cong. Rec., Vol. 88, Part 3, pp. 3228, 3576 .....9, 17

Cong. Rec., Vol. 88, Part 4, pp. 4503-4507 .....17, 19

Federal Reserve Bulletin, April 1942, pages 299, 424..3, 20

7 Fed. Reg. 10192, Codified at 10 C. F. R. 81.320—First Cumulative Supplement 22
Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate, Seventy-seventh Congress, Second Session on H. R. 6927; April 28 and 29, 1942, pp. 4, 8 16
Hearings Before the Committee on Banking and Currency, United States Senate, on S. 2250, March 20, 1942 6
H. Rep. No. 2030, Conference Report to Accompany H. R. 6868, Sixth Supplemental National Defense Appropriation Bill, 1942 16
House Report No. 2039, Report of the House Committee on Banking and Currency to Accompany H. R. 6927 14
New York Times, March 27, 1942, page 1 5
Senate Report No. 1219, "Conversion of Small Business Enterprises to War Production", Senate Committee on Banking and Currency, March 26, 1942... 5

No. 738.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

JOSEPH W. HART, LUELLA F. HART and J. CARL RUSSELL,
Petitioners,

v.

FEDERAL RESERVE BANK OF ATLANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITIONERS' SUPPLEMENTAL BRIEF AND REPLY TO THE BRIEF FOR RESPONDENT.

The Justice Department should not have asserted in the brief on behalf of the federal reserve bank that Executive Order No. 9112 "specifically" granted authority to the War Department to guarantee "any contract found by the War Department to be 'necessary, appropriate or convenient for the prosecution of the war'" (Respondent's Brief, page 7). This general language of the executive order must be read in the light of the central

purpose of the order and the history and surrounding circumstances of its issuance. **Johansen v. U. S., 342 U. S. 427, 72 S. Ct. 849, 96 L. ed. 1051.** In construing a statute, this Court in **U. S. v. Nice, 241 U. S. 591, 36 S. Ct. 696, 60 L. ed. 1192,** stated:

> "The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations and not literally, is obvious."

THE PURPOSE OF EXECUTIVE ORDER NO. 9112.

Executive Order No. 9112 was a procurement order, designed to increase production of war materials, supplies and equipment by assisting small manufacturing concerns to take subcontracts under prime contractors with the armed services—especially the Army. It was never in contemplation—by either the President or the Congress—that the armed services would be empowered to enter into the field of private defense housing by adding another government guaranty on top of F. H. A. 90-percent-of-value insured housing loans authorized by other legislation and for which an appropriation was made to Federal Housing Administration.

Executive order No. 9112 read as a whole is not reasonably susceptible of the construction that the president assumed the power to authorize the War Department, the Navy Department and the Maritime Commission to guarantee loans to anybody they pleased for any purpose they pleased so long as they were engaged in **any** business or operation deemed by them to be necessary, appropriate or convenient for the prosecution of the war. In the first paragraph of the preamble the purpose of the order is stated in these words

". . . in order that contracts of the War Department, the Navy Department, and the United States Maritime Commission . . . which are now outstanding or may hereafter be entered into for war production, including the obtaining or conversion of facilities, may be promptly and effectively performed...."

In the second paragraph of the preamble the purposes of the order are indicated as being consistent with (and not outside of) the objects for which appropriations had been made to the three departments by the Congress. This paragraph is as follows:

"Whereas the War Department, the Navy Department, and the Maritime Commission have available to them amounts appropriated by Congress which may be used for the purpose of making or guaranteeing loans, discounts or advances or commitments in connection therewith for the purpose of financing contractors, subcontractors and others engaged in such production or otherwise to expedite war production."

In the Federal Reserve Bulletin for April 1942 at page 299, Executive Order No. 9112 was printed together with a statement by the White House that the order was aimed at curing a situation which had interfered with the all-out participation of small business enterprises in war production. We quote from the Federal Reserve Bulletin as follows:

War Financing Contracts.

The President of the United States on March 26, 1942, issued an Executive Order authorizing the War and Navy Departments and the Maritime Commission to enter into financing contracts to facilitate the prosecution of the war. There is published below the text of this Order together with a statement by the White House.

The White House, Washington, D. C.

March 26, 1942.

The Executive Order authorizing the financing of contracts to facilitate the prosecution of the war is aimed at curing a situation which has interfered with the all-out participation of many small business enterprises in war production. Senators Murray, Mead and Capper have been particularly anxious to bring about this participation. Full production of the nation's smaller businesses is essential to victory.

The Order was prepared by the War Production Board, the War and Navy Departments and the Maritime Commission. It is the opinion of Messrs. Nelson, Patterson, Forrestal and Admiral Land that this order will greatly speed the war production of small business and subcontractors generally.

The basic purpose of the Order is to put working capital financing on a war basis. Up to now peacetime restrictions on banks and credit agencies have made it difficult for them to finance war production although the banks have been anxious to use their resources for prosecution of the war.

Under the Order, the War Department, the Navy Department, and the Maritime Commission may guarantee or make loans when they are needed for war production. These guarantees will support the operations of the banks, the Federal Reserve System, the Reconstruction Finance Corporation, and other credit agencies. They will not be made under peacetime credit rules. They will be made by production men, wherever additional financing is essential for additional production. Peacetime restrictions on credits cannot hold up production of war supplies needed by the armed forces.

The text of the order follows:

(See appendix to petition, page 52.)

On March 26, 1942, the same day President Roosevelt issued Executive Order No. 9112, The Senate Committee on Banking and Currency submitted Sen. Report No. 1219 entitled "Conversion of Small Business Enterprises to War Production." In this report, which recommended the passage of S. 2250, a bill to mobilize the productive facilities of small business in the interests of successful prosecution of the war, appears a statement that on February 5, 1942, the bill S. 2250 was reported unanimously by the Committee on Small Business and referred to the Committee on Banking and Currency. It is stated that extensive hearings were then held by a subcommittee at which various persons expressed their views with respect to the problems confronting small business enterprises and the necessity of mobilizing their activities to the fullest extent in connection with the war effort.

The New York Times on March 27, 1942, on the first page, reported the issuance of the executive order under the following caption:

"ORDERS WAR LOANS TO SMALL BUSINESS —PRESIDENT MOVES TO GUARANTEE WORKING CAPITAL TO OBTAIN CAPACITY ARMS PRODUCTION."

In the body of the news article it was stated that Senators Murray of Montana, Mead of New York and Capper of Kansas were invited to the White House for the ceremonies in connection with the signing of the executive order by President Roosevelt and that Under Secretaries Patterson and Forrestal and Admiral Land were also present. The same news article contained the following statement:

Financing "On a War Basis".

The White House said that the basic purpose of the order was to put working capital financing on a war basis, and added:

"Peacetime restrictions on banks and credit agencies have made it difficult for them to finance war production, although the banks have been anxious to use their resources for prosecution of the war."

Under-Secretary Patterson explained that a small business enterprise, which had a normal annual turnover of $100,000 in peacetime products, might now find itself with $5,000,000 worth of war subcontracts on its books. Unless easy money was provided, he went on, the concern probably would not be able to meet its charges for labor and raw materials.

Until today, Mr. Patterson added, the War Department had been authorized by law to advance only up to 30 per cent of the contract cost to prime contractors, and to make no loans whatever to subcontractors. Under the new policy each of them may be helped up to 100 per cent, if necessary.

In the hearings before the Committee on Banking and Currency United States Senate on S. 2250 on Friday, March 20, 1942, Hon. Robert Patterson, Under Secretary of War, testified that a system for the financing of subcontractors and supplies had been given careful study by the Army, the Navy, the Maritime Commission, and the War Production Board, as well as the Federal Reserve System, that the system was then being formulated and was expected to take effect very shortly under a proposed Executive Order which they thought was proper under the First War Powers Act, "whereby Army and Navy funds already appropriated for supplies can be used to take the risk of loss in advances made to subcontractors

by the regular banking connections of those subcontractors . . .'' An excerpt from Under Secretary Patterson's testimony is printed in the appendix to this brief.

The intent of President Roosevelt as to the authority conferred upon the War Department, Navy Department and the Maritime Commission by Executive Order No. 9112, of course, is that which he had when he signed the order. The order itself discloses that he deemed that his authority to make the order was derived from the Constitution of the United States and the various provisions of the First War Powers Act, 1941, approved December 18, 1941 and by all other acts of Congress.

The part of the First War Powers Act, 1941, deemed to confer authority upon the President to issue Executive Order No. 9112 obviously was Title II, which was as follows:

''Title II—Contracts

''Sec. 201. The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war; . . .''

Appendix to Petition, page 31.

The Constitution forbids that money shall be drawn from the Treasury but in Consequence of Appropriations made by Law (Art. I, Sec. 9, Cl. 7). And there has been

in force for a long time a law providing: "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied to the objects for which they are respectively made, **and for no others.**" (Title 31, U. S. C. A. 626, emphasis added.) We find no provision in the First War Powers Act, 1941 that would make it lawful for the President to authorize the War Department, Navy Department or the Maritime Commission to apply money appropriated for **specific** objects to guarantee **any** contract found by them to be "necessary, appropriate or convenient for the prosecution of the war."

Congress, by the Military Appropriation Act, 1942, approved June 20, 1941, 55 Stat. 366, had made appropriations for the Military Establishment under the headings "Military Activities—Expediting Production" for the object of enabling the Secretary of War, with the approval of the President, "to expedite the production of equipment and supplies for the Army for emergency national defense purposes, including all of the objects and purposes specified under each of the appropriations available to the War Department during the fiscal year 1942, for procurement or production of equipment or supplies for erection of structures, or for acquisition of land; the furnishings of Government-owned facilities at privately owned plants; the procurement and training of civilian personnel in connection with the production of equipment and material and the use and operation thereof; and for any other purposes which in the discretion of the Secretary of War are desirable in expediting production for military purposes and are approved by the President, ..." By the final proviso to this paragraph of the Military Appropriation Act, 1942, it was provided:

> ". . . Provided further, That no obligation shall be incurred for or on account of objects appropriated

for under this head of the Military Establishment except in pursuance of specific appropriations."

By Executive Order No. 9070 issued February 24, 1942, President, by virtue of Title I of the First War Powers Act, 1941, approved December 18, 1941, had directed that all functions, powers, and duties relating to defense housing of the War Department and the Navy Department with respect to housing units for persons (with families) engaged in national defense activities (except housing units located on military or naval reservations, posts, or bases) under Title IV of the Naval Appropriation Act for the fiscal year 1941, should be administered under the direction and supervision of a National Housing Administrator (Appendix to Petition, p. 49).

On March 31, 1942, S. 2250, the bill for conversion of small business enterprises to war production, came on for consideration by the Senate. (Vol. 88, Cong. Rec., Part 3, p. 3228.) Each of the three senators who were invited to the ceremonies for the signing of Executive Order No. 9112 by President Roosevelt made statements concerning the purpose of the executive order and showing how it was related to the bill the Senate was considering. First, Senator Murray said:

"Mr. Murray: . . . A few days ago, the President issued an Executive order in which he authorized the War Department, the Navy Department, and the Maritime Commission to make loans and discounts, advances and commitments, in order to expedite and aid in bringing about complete utilization of small business. The President invited three members of our committee to the White House at the time when he was signing the Executive order; this ackowledged the efforts of our committee to solve the problem. My understanding is that the Executive order will greatly aid in achieving the objects we have sought to

accomplish through our efforts in connection with the bill" (pp. 3228-3229).

Senator Capper stated:

"I believe I appreciate fully some of the possibilities in the President's Executive order taking off the restraints on lending by Government, by R. F. C., by banks, and by other lending agencies, so that working capital may be provided wherever necessary, appropriate, or convenient to the war effort. I appreciate the fact that some of the Government-underwritten loans will be made to small industries, but under that order there is no one, no agency, no responsibility for seeing that the small concerns get any of its benefits.

"The Smaller War Plants Corporation proposed in the pending bill will be in position, will have the responsibility (under control of the War Production Board, so that it will not do anything to hamper war production) to utilize the very broad powers created by the President's Executive order allowing unlimited lending for war production" (p. 3235).

Senator Mead, the other senator, who was invited to the ceremonies in the White House for the signing of Executive Order No. 9112, stated:

"Mr. Mead: Mr. President, as one who is very deeply interested in the problems of small business, as one who, as far back as 1936, introduced a bill to set up a system of guaranteed loans for small business, I wish to make a few observations concerning the measure which is now before the Senate for consideration. The bill, like the President's order, seeks to put working capital, financing, on a war basis, and seeks to eliminate peacetime restrictions on banks and other credit agencies, so that we may cut away

the red tape and expedite the war-production program . . ." (p. 3237).

Senator Taft, in his statement before the Senate, emphasized that the purpose of the executive order by the President was

> "to guarantee the Reconstruction Finance Corporation or anybody else against loss on contracts. In other words the Army and the Navy are making the loans themselves."

Senator Taft further said that the main purpose of the bill under consideration by the Senate was not the loan, the financing. Its main purpose, he said, was "to mobilize small industry to take war contracts. The financing provision is included only because financing is in many cases an essential tool to enable the other work to be done . . ." (p. 3268).

Senator Ellender stated:

> "Mr. Ellender: Permit me to read one of the paragraphs from the President's statement, which I failed to read. I did not think it was necessary; but, in view of the question propounded by the Senator, let me read it:
>
> > The Executive order authorizing the financing of contracts to facilitate the prosecution of the war is aimed at curing a situation which has interfered with the all-out participation of many small-business enterprises in war production. Senators Murray, Mead, and Capper have been particularly anxious to bring about this participation. Full production of the Nation's smaller businesses is essential to victory.
>
> I presume the President had in mind the bill now before us, because it is a product of the Small Busi-

ness Committee, which has held hearings on the subject" (p. 3270).

Question was raised in the Senate as to why the sum of $100,000,000 was fixed as the amount of the capital stock of Smaller War Plants Corporation. Senator Murray answered this question:

"Mr. Murray: Of course, I realize, with the Senator, that $100,000,000 will not go very far; but, as the Senator from Ohio (Mr. Taft) explained a little while ago, what we are undertaking in the pending bill is largely an experiment. We have held hearings, and have brought witnesses here from all over the country, and we realized that we are going to get production. We must get it through some such machinery as that which we are seeking to set up under the bill. We fixed on the sum of $100,000,000 because that would at least give us an opportunity to try out the program. Since the agitation has developed as a result of studies of the committee, the President—as has just been pointed out in the debate—has issued an Executive order in which he has authorized the War Department, the Navy Department, and the Maritime Commission to make advances, loans, and commitments to corporations intending to carry on war production.

"It will be observed that the Executive order is not in conflict with our bill, but is supplemental to it; and the probability is that our loaning activities will be confined to small plants which find it difficult to get loans through the regular channels; but they will be able to secure loans only after having the War Production Board and the corporation set up under Donald Nelson decide that they are competent and capable of carrying through such contracts and that they are essential for the production program" (p. 3270).

Senator Brown of Michigan moved to amend the bill so as to authorize the War Department and the Navy Department to guarantee any loans or advances made by the Smaller War Plants Corporation. He said that the amendment he proposed was identical with the provision in the bill with respect to loans made by the Reconstruction Finance Corporation, and was identical with the language in the Executive order of the President. As passed by the Senate a new section was inserted reading as follows:

> "Sec. 7. The War Department and the Navy Department are hereby authorized to participate in or to guarantee any loans made pursuant to this act, and in connection therewith they may use any funds heretofore or hereafter made available for purposes of procuring war materials, supplies, and equipment" (p. 3274).

At the top of page 8 of the Respondent's Brief the statement is made that on June 11, 1942, Congress passed a bill which specifically authorized the War Department to make loan guarantees in accordance with Executive Order No. 9112. This statement, following as it does, the garbled statements on page 7 concerning the authority conferred upon the War Department and the Federal Reserve Banks by Executive Order No. 9112 could have been misleading to the Court. Why did the Justice Department take out of context and quote only those clauses from the Executive order and H. Rept. 2131 that suited its purpose of trying to persuade the Court that the War Department was given authority to guarantee loans for housing and that Congress had authorized this to be done by the President? Why did they omit to tell the whole truth about the purpose of the Executive order and the Mobilization of Small Business Act?

While Congress had under consideration the bill to mobilize the productive facilities of small business in the

interests of successful prosecution of the war, it also had under consideration a bill to amend the National Housing Act (H. R. 6927). These amendments known as National Housing Act Amendments of 1942 added a new section to Title VI of the National Housing Act to authorize the insurance of mortgages on a 90-percent-of-value basis covering larger rental projects designed primarily for war workers.

On April 20, 1942, H. Rept. No. 2039 was committed to the Committee of the Whole House on the state of the union and ordered to be printed. This was the report of the House Committee on Banking and Currency to accompany H. R. 6927. The Report stated the purpose of the bill as follows:

> "The bill has for its purpose the continuing of the housing program for war workers through the medium of the mortgage insurance provisions of Title VI of the National Housing Act. Its enactment is essential at this time in order to enable private capital to continue its participation in that program, the existing mortgage insurance authority of $300,000,000 under Title VI having been exhausted.
>
> . . . . . .
>
> "Section 11 of the bill adds a new section to Title VI of the National Housing Act so as to authorize the insurance of mortgages on a 90-percent-of-value basis, covering larger rental projects designed primarily for war workers. This new section, except for the 90-percent-of-value limit and certain provisions providing for greater flexibility in the manner of controlling rents and leasing any other practices, contains, as applied to war rental housing, virtually the same provisions as are contained in Section 207 of the present law which operates independently of the emergency.

"Section 12 of the bill provides that nothing in the bill is to be construed to be inconsistent with or to supersede the Executive Order consolidating the various war housing agencies."

On April 22, 1942, the House of Representatives resolved itself into the Committee of the Whole House on the state of the union for the consideration of the bill (H. R. 6927) to amend the National Housing Act, and for other purposes. Mr. Steagall explained the purpose of the bill as being to insure loans for the construction of defense housing in defense areas, and to bring about as far as may be possible the construction of defense housing by private investment rather than by having such construction done under direct appropriation for the war program.

On April 22, 1942, the bill (H. R. 6927, 77th Cong., 2d sess.) passed the House.

On Tuesday, April 28, 1942, a subcommittee of the Committee on Banking and Currency, United States Senate, commenced hearings on the bill. At the commencement of the hearings, Hon. John B. Blandford, Jr., Administrator, National Housing Agency, made a statement before the subcommittee to provide the committee with a bit of background. He stated:

"We have now in the National Housing Agency all of the organizations concerned with housing, and therefore with war housing. We have been trying within the last few weeks to appraise the situation—to find out where we stand in meeting the job of housing war workers and trying to determine what lies ahead. In that effort we are working very closely with the War Production Board because it is the War Production Board that determines, with the War and Navy Departments, the industrial pattern, and therefore the need for workers, and therefore the need for housing.

. . . . . .

". . . I think you can feel completely assured that there is an urgent need for the 200,000 units which we hope private enterprise will provide, and that the $500,000,000 authorization is a conservative estimate of that part of the insurance that will land in F. H. A.; and further, that this is an authorization and that it is under control and that we are daily programming this method of utilizing this authority."

Hearings before a subcommittee of the Committee on Banking and Currency, United States Senate, Seventy-seventh Congress, second session on H. R. 6927; April 28 and 29, 1942, pp. 4, 8.

On May 1, 1942, the Senate Committee on Banking and Currency submitted its report on the National Housing Act Amendments of 1942 which was printed as Senate Report No. 1300. This report stated that the amendments recommended by the committee did not change materially the substantive provisions of the bill as it passed the House. The summary of the provisions of the bill was taken from House Report No. 2039.

On April 18, 1942, H. Rep. No. 2030 was ordered to be printed. This was the Conference Report to accompany H. R. 6868, the Sixth Supplemental National Defense Appropriation Bill, 1942. In the statement of the managers on the part of the House under "Title I—War Department", it was stated:

". . .; the House accepts the Senate amendment modified to make the merged appropriations available for carrying out the provisions of Executive Order 9112 of March 26, 1942, for the guaranteeing or making of loans to **contractors** and thus facilitating the participation of small business enterprises in the war production effort" (Emphasis added).

On April 21, 1942, Representative Clarence Cannon of Missouri, from the managers on the part of the House, explaining the bill on the floor of the House, said:

> "On March 26, 1942, the President issued Executive Order 9112, which authorizes the War and Navy Departments and the Maritime Commission to enter into contracts with any Federal Reserve bank, the R. F. C., or other financing institutions for the purpose of financing any contractor or subcontractor or others engaged in any business or operation which is deemed by War or Navy or Maritime Commission to be in the interest of the prosecution of the war. **This order is designed principally to give assistance to small business in financing its participation in war contracts. Provision has now been made in the bill so that the appropriations for the War and Navy Departments shall be available to carry out without question the intentions of the Executive order.** In my judgment, it was not necessary to include this special provision in the bill, but, since the Senate added the amendments, we see no harm in including them" (Emphasis added).
>
> **Vol. 88, Cong. Rec., Pt. 3, p. 3576.**

On May 13, 1942, H. Rep. No. 2131, the report of the Committee on Banking and Currency on S. 2250, Mobilization of Small Business for War and Essential Civilian Production was printed. On May 25, the bill was considered by the House of Representatives. H. Rept. 2131 is printed in the Congressional Record (Vol. 88, Pt. 4, page 4505). Under the heading "CHANGES FROM THE BILL AS PASSED BY THE SENATE", the following statement is made:

> "Section 7 has been modified so as to give legislative approval to the exercise of authority under

Executive Order No. 9112,[1] and to limit the participation in or guarantee by the War Department, the Navy Department, or the Maritime Commission, of loans made under the act to those loans made with a view to increasing the production of war materials, supplies, or equipment.'' (Emphasis added.)

Mr. Crawford, Representative from Michigan, explained the bill and stated as follows:

> "A third proposition in this bill is set forth in section 7, page 24 of the bill as submitted by the committee, wherein this bill puts in statutory form Executive Order No. 9112, issued by the President, authorizing the War Department, the Navy Department, and the Maritime Commission to guarantee loans made by commercial banks to business, small, intermediate, and large, engaged in producing goods ordered by those three agencies of government, the War Department, the Navy Department, and the Maritime Commission. Anyone who is interested in this production program and in what I would call high financing, can well afford to study these hearings. . . .
>
> Miss Rankin of Montana: Mr. Chairman, will the gentleman yield?
>
> Mr. Crawford: I yield.
>
> Miss Rankin of Montana: What is there in this bill which enables large or small companies, inexperienced in war work, to obtain risk capital to enable them to carry on the new work?
>
> Mr. Crawford: I would say that section 7 goes directly to that question, along with Executive Order

[1] The Justice Department in its brief (top of page 8) quoted the clause "to give legislative approval to the exercise of authority under Executive Order No. 9112," and stopped. It is unfortunate that the remainder of Sec. 7 stating the limitation upon the authority of the War Department, etc., was omitted.

No. 9112. I might enlarge on that just a little. As the war program unfolded itself the President discovered that there was a shortage of credit for certain types of operation, and certain firms. **He issued Executive Order No. 9112, authorizing the Army, the Navy, and the Maritime Commission to use funds appropriated to them by Congress for war production as a basis for guaranteeing loans made to manufacturing companies by commercial banks, the R. F. C., and the Federal Reserve banks.** In other words, through Executive Order No. 9112, which is made law by section 7 of this bill when enacted, it furnishes the risk capital which the lady from Montana has referred to . . .'' (Emphasis added).

Vol. 88, Cong. Rec. Pt. 4, pp. 4503-4507.

On April 28, 1942, the Sixth Supplemental National Defense Appropriation Act, 1942 passed and was approved (56 Stat. 226). On May 26, 1942, the day following the debate in the House on the Mobilization of Small Business Act, the National Housing Act Amendment of 1942 passed and was approved (56 Stat. 301). On June 11, 1942, the Mobilization of Small Business Act passed and was approved (56 Stat. 351).

There is nothing whatsoever in this whole train of circumstances, proceedings and events to indicate that President Roosevelt or the Congress intended to confer any authority on the War Department, the Navy Department or the Maritime Commission to guarantee loans for defense housing. No appropriation was made to the War Department for that purpose. All of the housing functions of the government had been consolidated into National Housing Agency by Executive Order No. 9070. (See Appendix to petition at page 49.) There was a limitation upon the authority of National Housing Agency to 90 percent of the estimated replacement cost of the completed property.

Is it conceivable that the Congress, after plainly limiting the Federal Housing Administrator to 90% loans on defense housing, empowered the War Department to nullify the limitation by the simple expedient of calling defense housing a "war product" and binding the Government to pay the remaining 10% of the loan? To maintain that proposition requires more sublety that the entire Justice Department has been able to conjure up for its client, the federal reserve bank.[2]

THE MALCONSTRUCTION OF EXECUTIVE ORDER NO. 9112 COMPOUNDED.

The statement in the second paragraph of page 8 of the Justice Department's brief that the federal reserve bank entered into the guarantee agreement in compliance with the procedures set out in Regulation V of the Board of Governors of the Federal Reserve System is misleading. The Board of Governors of the Federal Reserve System on April 10, 1942 announced the adoption of Regulation V to carry out the President's Executive Order No. 9112 of March 26, 1942, for the purpose of facilitating and expediting the financing of war production. This announcement was made by a Statement for the Press which was published in Federal Reserve Bulletin for April, 1942 at page 424. For the convenience of the Court this Statement is printed in the Appendix to this Reply Brief.

Had the Justice Department been a little more candid[3] with the Court they would have stated that the certificate

---

[2] Petitioners reiterate the statement contained in the footnote on page 5 of their Petition. All of this had been fully explained to the Justice Department before, elaboration therein seemed unnecessary.

[3] There is another incorrect and misleading statement in the Justice Department's Brief. In the footnote on page 8 appears the statement that the application for a War Department guaranteed loan was "by petitioners' corporation." The fact is that the application was not by petitioners' corporation but by one of the financing institutions, The First National Bank of Birmingham.

of convenience and necessity was signed by a major in the Army stationed at the Federal Reserve Bank of Atlanta as a liaison officer. According to the Statement for the Press issued by the Board of Governors of the Federal Reserve System, the only authority of such a liaison officer was to certify to the reserve bank that an applicant for financing was qualified from "the technical or production standpoint to carry out a contract, subcontract or order for war supplies or equipment."

The application showed on its face that Country Club Village Corporation was not a prime contractor holding a prime contract with any unit of the Government. It showed also that Country Club Village Corporation was not a subcontractor having a subcontract or order for supplying war products. It stated in the printed par. 7 reading: "7. War products to be supplied by applicant for loan" that the war products were "Defense housing."

The certificate issued by the liaison officer is printed in the appendix hereto. How it came about that the federal reserve bank, with notice from the application itself that the guarantee was not for a loan to finance either a contractor or subcontractor under a prime contract with the War Department but for a housing loan, nevertheless issued the guarantee is unexplained in this record.

Regulation V contained a statement (Section 5), that the War Department, Navy Department, and Maritime Commission, after consultation with the Board of Governors of the Federal Reserve System, would issue general instructions with respect to the operations of the Federal Reserve Banks under the Executive Order, including provisions regarding the relationships of the Federal Reserve Banks with liaison officers or other field representatives of such agencies. It stated:

> "The operations of the Federal Reserve Banks under the Executive Order shall be conducted in accordance with such instructions."

The War Department did not construe Executive Order No. 9112 as relating to housing. Neither did the Board of Governors of the Federal Reserve System. By Section 7 of Regulation V it was provided:

> "With respect to **financing of production**, except as may be otherwise authorized specifically or by general instructions of the War Department, Navy Department or Maritime Commission, the maturity of any loan made or guaranteed in whole or in part by a Federal Reserve Bank on behalf of such agency shall be consistent with the needs of the borrower **for the fulfillment of the contracts or orders for which the financing is provided**" (Emphasis added).

The War Department's instructions for the handling of loans made under Regulation V were published in the Federal Register (7 Fed. Reg. 10192, codified at 10 C. F. R. 81.320—First Cumulative Supplement). The regulations governing Guarantees, Loans and Commitments, and Advance Payments are a part of Chapter VIII—Procurement and Disposal of Equipment and Supplies. Sec. 81.319 sets forth War Department policy in connection with prime contractors (b) and in connection with subcontractors (c). Subsection (d) deals with cooperation between contracting officers, liaison officers and the Federal Reserve Banks to devise "the most practical method of financing from the standpoint of maximum war production by the contractor." This subsection provides: "if a guaranteed loan or a direct loan, it may or may not be policed as to expenditures by the supply service most interested." And finally, subsection (d) provides that there should be a determination of the method of financing at the time of the award of the contract to prime contractors.

Sec. 81.320 of the War Department Regulations covers the subject of guarantees, loans and commitments under Executive Order No. 9112. This section sets out par. (5)

of Executive Order No. 9112, directing the agencies to make reports of all contracts entered into by them pursuant to the terms of this executive order, in accordance with the provisions of paragraph 1 of the regulations prescribed in Title II of Executive Order No. 9001, dated December 27, 1941. This paragraph relates to contracts and purchases—not to housing.

By Title I, par. 2 of Executive Order No. 9001, the things contracted for were defined very specifically, as follows:

> "2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types of things and services necessary, appropriate or convenient for the prosecution of war, for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament equipment, or supplies of any kind, or any portion thereof, . . ."

Subsection (b) of Section 81.320 of the War Department regulations provides that the administration of the powers conferred upon the War Department by Executive Order 9112 are vested in the Advance Payment and Loan Branch, Fiscal Division, Headquarters, Service of Supply. Subsection (c) provides that financial contracting officers attached to the Fiscal Division, Headquarters, Services of Supply, are to coordinate with the Federal Reserve Banks in arranging financing for businesses whose operations are necessary, appropriate or convenient for the prosecution of the war. By subsection (d) it is provided that liaison officers are attached to the Advance Payment and Loan Branch, Fiscal Division, Headquarters, Services of Supply. Subsection (e) deals with the procedure for obtaining guaranteed loans by contractors. By subsection

(g) it was provided that loans and guarantees must be submitted to the Advance Payment and Loan Branch when the amount exceeded $100,000.

Unquestionably, the certification by the liaison officer of the War Department dated October 31, 1942, prior to the issuance of the War Department Regulations on December 8, 1942, on the basis of which Federal Reserve Bank of Atlanta, as Fiscal Agent of the United States on behalf of the War Department, guaranteed to the two Alabama banks 90% of the loan to finance Country Club Village Corporation

> ". . . in the construction of 425 single family dwelling units with other improvements, including streets, water distribution systems, and power lines; said dwelling units to be located on a tract of land situate in Mobile County, Alabama, on Old Shell Road near Springhill"

was without authority of law. This was an illegal transaction and Federal Reserve Bank of Atlanta was chargeable with knowledge of this fact. The Supreme Court has declared that public policy demands that every depository of public money shall be held to strict accountability. **U. S. v. Prescott, 3 How. 578, 11 L. ed. 734; Lee v. Munroe & Thornton, 11 U. S. 366, 3 L. ed. 373.**

Plaintiffs-Appellants sought a discovery from the Federal Reserve Bank concerning the transaction and the certification on which it relied for the authority to pay out funds belonging to the United States of America under the guarantee agreement. The discovery was denied by the court below.

In **Wisconsin Central R. Co. v. United States, 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399,** the Supreme Court declared:

> "As a general rule, and on grounds of public policy, the government cannot be bound by the action of its

officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act unauthorized payments are made. Whiteside v. United States, 93 U. S. 247; Hawkins v. United States, 96 U. S. 689, and cases before cited."

The Justice Department is plainly wrong in stating in its Brief that the Federal Reserve Bank was lawfully involved in the transaction.

WHY JUSTICE DEPARTMENT CANNOT INVOKE DOCTRINE OF ESTOPPEL TO PROTECT FEDERAL RESERVE BANK.

In the footnote at the bottom of page 7 of its Brief, the Justice Department contends that petitioners should be estopped to challenge the "authority of the Federal Reserve Bank and the War Department to grant the guarantee for which they themselves had applied." Heretofore, petitioners have corrected the statement that they applied for the guarantee. The application for the guarantee was made by one of the financing institutions, The First National Bank of Birmingham. The application contains the following statement:

> "12. The applicant for the loan herein referred to (Country Club Village Corporation) has been advised that financing institution is applying for this guarantee in the amount and subject to the terms herein indicated."

In this litigation, petitioners are not seeking to set aside the judgment against them which the Government has obtained. They are seeking to recover from the federal reserve bank the loss which both the United States and themselves have sustained as the result of the vio-

lation of the laws of the United States protecting the public money. **It ill behooves the Justice Department to try to protect the malefactors. It would seem that the Justice Department would try to protect the interests of the United States.**

In **Scott Paper Co. v. Marcolus Mfg. Co., 326 U. S. 249, 66 S. Ct. 101, 90 L. ed. 47,** this Court said:

> "Estoppel cannot, any more than private contract, be the means of successfully avoiding the requirements of legislation enacted for the protection of the public interest."

It is indeed a strange spectacle in this case: petitioners before the Court are seeking to protect the public interest by upholding the Constitution and laws of the United States for the protection of public funds, while the Justice Department is trying to defeat them by raising all manner of legal technicalities.

WHY DEFENSE OF FEDERAL RESERVE BANK BY JUSTICE DEPARTMENT IS CONTRARY TO PUBLIC POLICY.

The Justice Department in its Brief for the Respondent contends that the Federal Reserve Bank was acting as agent for the United States. We have shown that the acts of the Federal Reserve Bank were without authority of law and not binding on the Government.

The Justice Department says that petitioners have litigated the issues of fairness of the sale of the corporate property and the adequacy of the price therefor, and lost. That statement is true. But the reason they have lost is that the Justice Department has not yet produced the evidence in the files of the War Department and the Federal Reserve Bank that will show why the sale of property

was made by private sale en masse for so small a consideration.

The Justice Department says that

> "Petitioners in the past have had ample opportunity to prove the 'fraud' they seek to demonstrate in this action; their proof has been found to be 'entirely unconvincing' and to refute rather than substantiate their contentions. They are not entitled to try to revive these claims in this suit" (Respondent's Brief, p. 9).

The Court of Appeals, in its opinion affirming the decision of the district court in the prior suit, said:

> [2, 3] The government's certificate of indebtedness of the appellants herein which was not questioned was prima facie evidence of the balance of such debt owing by the appellant. We detect no reversible error in the District Court's finding that this evidence was not satisfactorily rebutted through the appellants' claim of bad faith dealings on the part of the banks with the government's assent, the testimony of the appellants' own witnesses having detracted materially from their claim that the price at which these properties were sold was unfair and inequitable. Moreover, the defense of bad faith was an "avoidance" within Rule 8 (c) Federal Rules of Civil Procedure, Title 28, U. S. C. A., and the defendant did not carry the burden of substantially proving this defense.
>
> **U. S. v. Hart, et al., 312 F. 2d 127, 130.**

The Justice Department should be abashed to act upon the failure of the defendants to carry the burden of proving their defense of bad faith dealings with the collateral in the prior suit. Defendants (petitioners before this Court) failed because the Justice Department answered the defendants' Interrogatory No. 9 in the prior suit that

"Plaintiff (United States of America) had no knowledge" of the matters inquired about in the interrogatory (See Petition page 18). But, the War Department and Federal Reserve Bank of Atlanta had knowledge about the matter. They had to have **some** reason for making the sale of the subdivision at the time it was made, for the consideration they agreed to accept and for releasing the lien to enable the sale to be made. If their decision was an honest and good faith decision and they thought that they were acting for the best interests of the United States, they would surely be willing to open their files and show there was no fraud in the sale.

In this present action, petitioners propounded interrogatories to the acting attorney general of the United States as follows:

Interrogatories Propounded by the Plaintiffs to Nicholas deB Katzenbach, Attorney General of the United States—Filed April 8, 1965.

The plaintiffs, Joseph W. Hart, Luella F. Hart and J. Carl Russell, in pursuance to Rule 33 of the Federal Rules of Civil Procedure, propound the following interrogatories to be answered by Nicholas deB Katzenbach, Attorney General of the United States, personally:

Interrogatory No. 1.—Has an investigation ever been made by the Department of Justice, the Federal Bureau of Investigation, or any other officer, agency or department of the United States of America of the sale of Country Club Village housing project in Mobile, Alabama, made in October, 1945, by Federal Reserve Bank of Atlanta, purporting to act as fiscal agent of the United States of America, The First National Bank of Birmingham, Birmingham, Alabama, and The Merchants National Bank of Mobile, Mobile, Alabama, to R. B. Ellinor or Spring Hill Homes, Inc., for $37,170.00 to be paid by

a post-dated check to determine whether this was a good faith sale, for a fair and adequate consideration and for the best interests of the United States of America?

Answer:

Interrogatory No. 2.—If such investigation has been made, will you file a copy of the report or reports of such investigation as exhibits to your answer to these interrogatories?

Answer:

Interrogatory No. 3.—If such investigation has not been made, will you cause to be made a full and thorough investigation of the sale, examining particularly the files of the War Department and Federal Reserve Bank of Atlanta, and state your conclusion whether or not said sale was made in good faith, for a full, adequate and fair consideration and in the best interests of the United States of America, giving reasons for your conclusion.

Answer:

Interrogatory No. 4.—After weighing all pertinent facts surrounding said sale, does it appear that the interests of the United States of America will be best served by the United States continuing to attempt to collect the judgment rendered in its favor against the plaintiffs, Joseph W. Hart and J. Carl Russell, and defending this action for Federal Reserve Bank of Atlanta on the grounds that it is protected by governmental immunity or does it appear in this case, in the language of the United States Supreme Court in **Land v. Dollar, 330 U. S. 731, 738**, that the "dominant interest of the sovereign is . . . on the side of the victim . . ."—in this case the plaintiffs?

Answer:

Fyke Farmer,
Attorney for Plaintiffs.

Why did the Justice Department avoid answering these interrogatories? (Petition for Certiorari, p. 19).

After the Petition was filed and before the Brief of Respondent was filed, petitioners' attorney wrote a letter to the Solicitor General. This letter, together with the reply of the Solicitor General is printed in the Appendix at pages 43-47.

SUPPLEMENTARY STATEMENT OF REASONS WHY WRIT SHOULD BE GRANTED.

This Court has previously held that a private sale of the property of the United States by a naval contractor, without survey, inspection or appraisement, for $2,000.00 which the buyer resold for $8,975.56, was illegal because without authority of law, saying:

> The fact that the account of the appellant was settled by the officers of the Navy Department by charging him with the value of the old material at $2,000 is no bar to the recovery of its real value by the government. The whole transaction was illegal, and appellant is chargeable with knowledge of the fact. It was, in effect, a private sale of the property of the United States without survey, inspection or appraisement, at a grossly inadequate price. The fact that the account had been settled by the officers of the Navy Department did not cure the unauthorized acts. Both the disposition of the property and the settlement of the account were without authority of law and not binding on the Government.
>
> **Steele, use of Corn Exchange National Bank v. U. S., 113 U. S. 128, 5 S. Ct. 396, 28 L. Ed. 952.**

The Justice Department in its Brief for Respondent has made no reply to that section of the argument in the

Petition under the heading, "Want of Authority in Federal Reserve Bank of Atlanta to Release Lien to Allow Private Sale of Subdivision to be Made." (p. 25).

Petitioners submit that public policy forbids that the Judicial Department of the Government condone fraud on the United States and overrides the public policy behind the doctrine of res judicata or collateral estoppel by judgment, insofar as it may have application to this case.

Instead of opposing petitioners' efforts to enforce the liability of the federal reserve bank, the Justice Department should be on their side. (See Motion of the Defendants filed August 24, 1965 in the action in which the United States recovered the judgment against petitioners Hart and Russell, Appendix to Petition, page 34.)

This case, from the standpoint of the amount involved, is little. The principle and public policy involved is very big: honesty in Government, faithful stewardship of the public funds, protection of the public interests under law.

Respectfully submitted,

FYKE FARMER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioners.